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No. 10-93

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STALLION, INC.,

Petitioner,

v.

JOHN GALLIANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented a compelling reason for this Court to review the decision of the New York State Court of Appeals affirming each lower court's recognition of a judgment rendered against Petitioner in France where: (1) the decision below was based on the application of a New York state statute and does not implicate any important federal question; (2) the decision below does not conflict with any decision of this Court, state court of last resort or United States Circuit Court; (3) each court below unanimously found that service upon Petitioner of the French pleadings comported with due process and that Petitioner had actual notice of the French Proceedings; (4) Petitioner contractually agreed to litigate all disputes arising between Petitioner and Respondent in France under French law; (5) Petitioner ignored three separate instances of service of process over a fifteen-month period; and (6) Petitioner has never asked the agreed forum court in France to vacate the judgment against it.

STATEMENT PURSUANT TO RULE 29.6

Respondent, John Galliano, S.A., has no parent corporation. No publicly held company owns 10% or more of its stock.

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PRELIMINARY STATEMENT

There is no compelling reason – indeed, there is no reason at all – to grant the Writ of *Certiorari*. The decision of the New York State Court of Appeals raises no federal question. Rather, the decision below was grounded almost entirely on well-settled New York common law principles, and on the New York Civil Practice Law and Rules (the "CPLR"). Neither does the decision below conflict with any decision of this Court, a state court of final resort, or any United States Circuit Court. Instead, the Petition cites decisions that do not remotely resemble the facts presented here; the closest it comes is the 1972 decision of an intermediate California appellate court not relied upon by any court since. The absence of other decisions treating service in the United States of foreign court papers makes clear that American companies doing business abroad will suffer no significant impairment if the Petition should be denied.

The Petition does not genuinely raise any question about the constitutional rights of U.S. companies doing business abroad. One need only look to the Petition to see that, far from raising any question of constitutional law, Petitioner would like this Court to police the Courts of France and to determine whether Respondent's three separate instances of service of French process upon Petitioner in New York "deprived *the French Court* of personal jurisdiction over [Petitioner]." (italics added) Petitioner had years to raise this question before the French Court, but failed to do so.

The Petition frames the two issues for this Court to review: (1) whether the New York State Court of Appeals properly applied New York's Uniform Recognition of Foreign Country Money Judgments Act; and (2) whether its factual determination that service comported with due process was correct. Neither of these issues justifies this Court's review. A petition for a Writ of *Certiorari* is rarely granted where, as here, the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 612, 116 S.Ct. 1589, 1617, 134 L.Ed.2d 809 (1996) (Dissenting Opinion, J. Ginsberg) (citing Supreme Court Rule 10); *N.L.R.B. v. Waterman S.S. Corp.*, 309 U.S. 206, 207, 60 S.Ct. 493, 495, 84 L.Ed. 704 (1940) ("We do not ordinarily grant *Certiorari* to review judgments based solely on questions of fact.").

Petitioner has not succeeded in locating a single decision in which a court has held that a U.S. defendant in a contractually-agreed foreign judicial forum is entitled to a full translation of the foreign complaint. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923) (Dissenting Opinion, J. Taft) explaining that:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Id.*

Simply put, Petitioner has singularly failed to carry its burden of demonstrating that there are

any compelling reasons for this Court to grant the Petition.

The Petition should be denied.

STATEMENT OF THE CASE

I. New York's Uniform Recognition of Foreign Country Money Judgments Act - Article 53 of New York's CPLR

Under New York's Uniform Recognition of Foreign Country Money Judgments Act, codified at CPLR Article 53 ("Article 53"), a foreign money judgment that is final, conclusive, and enforceable where rendered is generally to be recognized in New York unless an enumerated ground for non-recognition under CPLR 5304 exists. *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 222, 762 N.Y.S.2d 5 (N.Y. 2003) *cert den'd* 540 U.S. 948, 124 S.Ct. 399, 157 L.Ed.2d 279 (2003). CPLR 5304's grounds for non-recognition include a lack of personal jurisdiction over the defendant (CPLR 5304(a)(2)) and a defendant's failure to receive "notice of the proceedings in sufficient time to enable him to defend" (CPLR 5304(b)(2)). However, CPLR 5304's grounds for non-recognition must be read together with CPLR 5305(a)(3), which forecloses challenges to the foreign court's personal jurisdiction where, as here, "the defendant prior to commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved."

II. The Underlying Dispute

On January 23, 1998, Petitioner and Respondent's predecessor in interest, Les Jardins D'avron ("Les Jardins"), a French Company, entered into a licensing agreement (the "Agreement") pursuant to which Les Jardins agreed to license the "John Galliano" trademark to Petitioner. The Agreement and subsequent assignment of rights to Respondent John Galliano, S.A. ("Galliano"), also a French company, were executed in Paris, France.

The Agreement is governed by the laws of France. It provides for an exclusive forum in the courts of Paris, France, for any dispute arising out of the Agreement. Nothing in the Agreement requires translation of French pleadings into English.

In 2001, disputes arose between Galliano and Petitioner regarding royalties and other charges due to Galliano under the Agreement. On November 6, 2001, Galliano's Chicago-based counsel sent a letter to John Georgiades, Petitioner's president, notifying him, in English, that if Petitioner did not make payment of $187,500 in outstanding royalties by November 15, 2001, Galliano "[would] commence an action in the appropriate French Court . . ." Petitioner acknowledged that these discussions took place and failed.

III. Galliano is Served with French Process Three Times

In 2002, Galliano brought suit against Petitioner in the Paris Commercial Court. Petitioner was personally served at its offices on three separate occasions with French "writs," the French equivalent of a summons and complaint (the "French Writs"), first by the United States Marshal on behalf of the Department of Justice ("DOJ"), as Central Authority for the United States under the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"), and twice subsequently by private process servers contracted by the DOJ.[1] In connection with each writ, the Paris Court issued a "Demande/Request" ("Demande") to the DOJ that Petitioner be served in accordance with Article 5(2) of the Hague Convention. All three of the French Writs contain repeated references to "Stallion," "Galliano," "Les Jardin," and the "$187,500" figure Galliano demanded from Petitioner, and the stamp of "Pascal Robert, Hussier de Justice," so that it would not be difficult to discern the nature of the papers, even written in French, simply by reviewing them. In each case, the U.S. Central Authority completed and returned the required Certificate/Attestation documenting that service had been effected.

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[1] The French Court asked Galliano to supplement the first writ to add additional details of its claim. Accordingly, a second writ was prepared and served on Petitioner. It contained an arithmetical error as to the relief demanded, requiring service of a third writ, largely identical to the second but with the error corrected.

Petitioner has never denied being served with the French Writs, or accepting service thereof. Notwithstanding that fact, Petitioner ignored all three writs and allowed judgment in Paris to be entered in favor of Galliano.

IV. Petitioner is Served with the French Judgment

By Judgment, dated October 7, 2004 (the "French Judgment"), the Paris Commercial Court awarded damages to Galliano on most, but not all of its monetary claims.[2] Article 15 of the Hague Convention prohibits a signatory nation's court from entering judgment by default unless it is satisfied that the foreign defendant was served "in sufficient time to enable the defendant to respond." Affidavits submitted by both parties are in accord.[3]

[2] The French Judgment shows that the French Court examined Galliano's proofs before entering judgment and *sua sponte* struck one of Galliano's claims.

[3] The affidavit submitted by Galliano's French counsel says "the [French] Court unquestionably satisfied itself that [Petitioner] was served properly and in accordance with the applicable law, and that it had thereby acquired jurisdiction over [Petitioner], or it would not have entered judgment for Galliano." The French attorney who submitted an expert affidavit to the Trial Court on Petitioner's behalf agreed that a French judge "must be assured that a defendant has knowledge – through service – that he is a party to a case in a foreign country . . ." and has the "discretion to implement any action to verify the validity of service . . . to ensure the defendant is fully aware of the ongoing proceeding."

On or about December 16, 2004, the DOJ served the French Judgment, pursuant to the French court's request, on Petitioner through the Hague Convention "by delivery to the addressee, if he accepts it voluntarily (second paragraph of Article 5 [of the Hague Convention])." The Affidavits of Service contained in the record reflect that, on February 9, 2005, a process server named Maria Bass served a copy of the French Judgment on Petitioner, by "presenting to and leaving the same with" Petitioner's receptionist."[4]

Petitioner did nothing after being served with the French Judgment, even though French law affords Petitioner one year to seek to vacate a default judgment. Thus, on four separate occasions, Petitioner's employees accepted and ignored court documents served by professional process servers acting under the authority of the United States government.

V. The Trial Court Recognizes the French Judgment

The Trial Court granted Galliano's motion for summary judgment in lieu of complaint, concluding that the French Judgment met the substantive requirements for recognition under Article 53. *See* Trial Court Decision, Appendix C, at p. 15(a) (quoting Article 53).

The Trial Court also found that Petitioner's challenges to service lacked merit, finding that personal

[4] The Amended Affidavit of Service shows that the French Judgment was "voluntarily accepted" by Petitioner's employee Maria D'Este. All four instances of service took place at Petitioner's principal place of business.

delivery of the French Writs on three separate occasions to Petitioner's employees who do not deny receiving them or claim to have rejected service was service "made in a manner calculated to give the defendant fair notice of the legal proceedings against it." *Id.* at p. 20a. The Trial Court further found "nothing unfair or inappropriate" about personal service of the French Writs upon Petitioner in the language in which it agreed to litigate and noted that:

> Stallion had every reason to anticipate that in the event of litigation between the parties, it would be subject to proceedings in a French Court conducted in French. Appendix C, at pp. 19a-20a.

The Trial Court also considered and rejected Petitioner's claim that service was fatally defective under the Hague Convention because the French Writs were served in French. The Court correctly observed that Petitioner failed to cite "any rule or regulation promulgated by the [DOJ]" which "requires" that foreign judicial documents served in the United States pursuant to the Hague Convention to be translated into English. *Id.* at 17a. Petitioner subsequently moved for renewal based on documentation ostensibly obtained through a FOIA request, the same documentation it presented to the Appellate Division, Court of Appeals, and now to this Court. The Trial Court concluded that these documents also failed to establish a requirement under the Hague Convention or any United States statute, rule, regulation or treaty declaration, and were at best advisory opinions without the force of law.

No subsequent reviewing court has disagreed.

VI. The Appellate Division Affirms

In its Decision and Order, the Appellate Division of the New York State Supreme Court (the "Appellate Division") affirmed the Trial Court's recognition of the French Judgment based on its application of Article 53. The Appellate Division, like the Trial Court, concluded that the French Judgment met the substantive requirements for enforcement under Article 53, holding that Petitioner's service defenses were foreclosed by CPLR 5305(a)(3) and that, in any event, service upon Petitioner comported with due process. "Defendant received notice of the French action; its service by personal delivery is unlikely to give rise to any objections based on due process." Appellate Division Decision, Appendix B, at p. 11a. The Appellate Division also rejected Petitioner's argument that the United States required translation under the Hague Convention holding that "even after considering the [FOIA] materials defendant submitted on renewal," summary judgment was properly granted. *Id.* at p. 10a.

VII. The New York State Court of Appeals Affirms

The New York State Court of Appeals affirmed recognition of the French Judgment based on its application of Article 53 and its factual determination that service upon the Petitioner comported with due process. Acknowledging CPLR 5304's grounds for non-recognition, the Court of Appeals concluded that Petitioner's challenges to the French Judgment based on CPLR 5304(a)(2) were foreclosed because ". . . the defendant prior to commencement of the proceedings

had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." Court of Appeals Decision, Appendix A, at p. 4a (quoting CPLR 5305(a)(3)).

In light of Petitioner's agreement to litigate *all* disputes before the French Court, including service issues, the Court of Appeals, following its precedents, declined to engage in a "microscopic analysis" to determine if the French Court correctly assumed jurisdiction over the dispute between the parties. Appendix A, at p. 7a.[5] Rather, it limited its inquiry to whether the French Judgment comported with New York's notions of due process. Court of Appeals Decision, Appendix A, at p. 7a.

The Court of Appeals agreed with the factual findings below, holding that Petitioner "received notice of the French action," and that the method by which it was served was "unlikely to give rise to any objections based on due process."

Accordingly, the Court of Appeals affirmed, concluding that:

> On this record, the enforcement of the French judgment is not repugnant to our notion of

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[5] The Court of Appeals properly noted that before rendering the default judgment the French Court satisfied itself that service was proper. Appendix A, at p. 6a ("for our purposes in applying Article 53 in this case, before it could properly issue a judgment against Petitioner in Petitioner's absence . . . it would seem clear that it was "established" to that court's satisfaction that Article 15's requirements were met.").

> fairness. Petitioner was well aware of its ongoing disputes with Galliano, and it was also aware that, under the licensing agreement, those disputes, if litigated, would be adjudicated in accordance with French law by a court in France.

Id. at p. 6a.

REASONS FOR DENYING THE PETITION

The Court of Appeals decision was based on its application of Article 53, a state statute, the constitutionality of which has never been challenged, and its factual determination, based on the record, that service comported with due process. The decision does not implicate an important federal question that has not been resolved by this Court, nor does it conflict with a decision of this Court, any Circuit Court or any other state court of last resort. It does not interpret a federal treaty. Accordingly, Petitioner has not carried its burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

Petitioner states only two "Reasons for Granting the Petition," and they are both different formulations of the same argument: Respondent's ostensible "failure to effect proper service under the Hague Convention" and its "failure to serve process sufficient to accord Stallion reasonable notice and opportunity to be heard" – in each case, by failing to serve English translations of the French Writs – "deprived the French Court of personal jurisdiction over Stallion."

In its travels through the New York State court system, Petitioner was unable to persuade a single judge of the proposition that there was anything unfair about the manner in which Petitioner was served on three separate occasions. Nothing about its successive losses below entitles Petitioner to the extraordinary relief it now seeks.

I. The Court of Appeals Decision Was Proper and Consistent with The Authority of This Court, the Circuit Courts and Other State Courts of Last Resort

The Court of Appeals' recognition of the French Judgment was based on its proper application of the CPLR, in accordance with Article 53's plain terms, its purpose and well-settled New York precedent. By its Petition, Petitioner does not challenge the constitutionality of Article 53, and it did not do so below.

Article 53 was enacted to "promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here." *CIBC Mellon Trust Co.*, 100 N.Y.2d at 221, 762 N.Y.S.2d 5. In accordance with its purpose, Article 53 is "liberally construed by New York courts in favor of recognition and enforcement." *Koehler v. Bank of Bermuda Limited*, No. M18-302(CSH), 2004 WL 444101 at p. * 9 (S.D.N.Y. March 10, 2004); *Sung Hwan v. Rite Aid Corp.*, 7 N.Y.3d 78, 850 N.E. 2d 647, 817 N.Y.S.2d 600 (2006). Under Article 53, a money judgment issued by a foreign court will generally be recognized and enforceable in New York, unless it fits within one of the specifically enumerated

exceptions set forth in CPLR 5304(a) and 5304(b). *CIBC Mellon*, 100 N.Y.2d at 221-222, 762 N.Y.S.2d at 9. Grounds for non-recognition include: (a) a lack of personal jurisdiction over the defendant by the foreign court (CPLR 5304(a)(2)); and (b) defendant's failure to receive notice of the proceedings in sufficient time to enable him to defend himself (CPLR 5304(b)(2)).

However, CPLR 5304(a)(2)'s provision for non-recognition on personal jurisdiction grounds does not apply, pursuant to CPLR 5305(a)(3), where, as here, "the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved." CPLR 5305(a)(3). As above, Petitioner expressly agreed to the application of French law and the exclusive forum of the Courts of Paris, France, and any challenge to its acquisition of jurisdiction over Petitioner was properly directed to the agreed forum court in France, not to the U.S. courts years after judgment was entered in France.

Petitioner argues that the French Court did not have personal jurisdiction over Petitioner because service in New York of writs written in French did not comply with the Hague Convention. Relying on CPLR 5304(a)(2), Petitioner argued that the French Judgment must be refused recognition because the French Court lacked personal jurisdiction.

There are several glaring flaws with this argument. First, as the Court of Appeals properly noted, Petitioner's objection to service "was an issue for the court in France," the contractually-agreed forum for

resolution of all disputes between the parties. *See* Court of Appeals Decision, Appendix A, p. 7a. Affiants on both sides agreed that the French Court was required to review the question of service before it could render a judgment, as does the text of the Hague Convention itself. The New York State Court of Appeals determination was in keeping with its standing refusal to engage in a "microscopic analysis" of the judgment of a foreign court. *Sung Hwan Co. Ltd., supra; See also Koehler, supra*, 2004 WL 444101, at p. *15 (citing *CIBC Mellon, supra*) (holding that defendant who is given ample notice and opportunity to present a defense but who elects to forgo these opportunities, is precluded from contesting recognition of foreign country judgment based on technical challenges to service). The French Court system has been widely recognized for its fairness and respect for due process.

Second, every court below that has examined the question has come to the unanimous conclusion that "Stallion 'received notice of the French action [and] its service by personal delivery is unlikely to give rise to any objections based on due process.'" Court of Appeals Decision, Appendix A, 5a (quoting Appellate Division Decision, Appendix B, 11a). To this day, Petitioner has still provided no factual evidence to the contrary; the affidavits of its receptionists do not assert that service was never effected or that they refused to accept it, and the affidavit of Petitioner's principal does not assert that Petitioner did not know that Galliano had brought suit in France.

Finally, as discussed in more detail below, neither the Hague Convention nor United States law requires

that foreign judicial papers served in the United States be translated into English. Neither the plain language of the treaty nor any governing statute, regulation or treaty declaration requires that foreign litigants translate foreign court papers into English. No United States court has read such a requirement into the Hague Convention.[6] And no court has found anything unfair about serving a defendant which has agreed to litigate in France, as Petitioner did, with Court papers written in the language of the agreed forum. Not only is there no constitutional issue at stake here, the Courts below were clearly correct.

II. Service Upon Petitioner Comported With Due Process

Petitioner's due process arguments also fail to establish that it is entitled to this Court's review. Petitioner claims that service of the French Writs

[6] With one inapplicable exception, *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal.Rptr. 796 (Cal. 1972), the cases cited by Petitioner are all from United States courts determining that they did not acquire jurisdiction over a foreign defendant when the foreign defendant was served defectively abroad. Just as the United States courts were able to determine their own jurisdiction, so too was it for the French forum court to decide whether service on Petitioner caused it to acquire personal jurisdiction over Petitioner. And *Julen*, the decision of an intermediate California state court, which has not been relied upon by any other court, expressly does not hold that the Swiss papers served on a California defendant must be translated into English, even in the absence of a forum selection clause. Unlike the instant case, Larson denied knowing that he had been sued in Switzerland.

violated its due process rights because: (1) service of the French Writs failed to comply with the Hague Convention; and (2) service of pleadings that are not translated *per se* violates due process. Each of the courts below conducted a due process analysis and found Petitioner's arguments unavailing. Petitioner has presented no evidence to this Court to warrant a different finding.

The Trial Court found that personal delivery of the French Writs on three separate occasions to Petitioner's employees who did not deny receiving them or claim to have rejected service was "service . . . made in a manner calculated to give the defendant fair notice of the legal proceedings against it . . ." Appendix C, at p. 20a. The Trial Court found "nothing unfair or inappropriate about service of the French Court documents," upon Petitioner in the language in which it had chosen to litigate, noting that:

> [Petitioner] had every reason to anticipate that, in the event of litigation between the parties, it would be subject to proceedings in a French court conducted in French. Appendix C, 18a-19a.

The facts presented by Petitioner do not show it received inadequate notice. Rather, they "show that [Petitioner] received papers it did not immediately understand and chose simply to ignore them." *Id.* at 19a.

Petitioner had a great deal of time in which to change its mind, but failed to.[7]

Like the court below, the Appellate Division unanimously concluded that: "Defendant received notice of the French action [and that] its service by personal delivery is unlikely to give rise to any objection based on due process." Appendix B, at 11a. The Appellate Division found that Petitioner was much like the defendant in *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005), who was personally served with foreign court pleadings, had actual notice of the foreign proceedings and made the tactical decision to ignore them.

The New York State Court of Appeals also reviewed the record and unanimously concluded that service comported with due process, explaining that:

> On this record, the enforcement of the French judgment is not repugnant to our notion of fairness. Petitioner was well aware of its ongoing disputes with Galliano, and it was also

[7] In the courts below, Petitioner did not rely on CPLR 5304(b)(2), and with good reason. That provision clearly addresses temporal concerns relating to events within the litigation, making reference to an insufficient period of time to respond. Michigan's highest Court has reviewed various state cases on the issue and, in interpreting identical statutory language, concluded that CPLR 5304(b)(2)'s language about "notice of the proceedings" is temporal and refers to "notice of particular relevant action taken within the case" as opposed to the case "as a whole." *See Isack v. Isack*, 274 Mich.App. 259, 733 N.W.2d 85 (2007).

> aware that, under the licensing agreement, those disputes, if litigated, would be adjudicated in accordance with French law by a court in France. Petitioner was delivered court papers written in French, first by a U.S. Marshal, then subsequently on two occasions by process servers from Process Forwarding International (the entity selected by the Department of Justice to carry out service in the United States under the Hague Convention), all in an effort to notify it of the commencement of the French proceeding. *Id.* at 6a.

Due process requires notice that is reasonably calculated to apprise a party of the pendency of a lawsuit and to afford that party the opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). It does not, as Petitioner argues, require pinpoint compliance with applicable service rules. *See, e.g., Koehler, supara,* 2004 WL 444101, at p.*15. Thus, service that provides the notice contemplated by *Mullane* but does not strictly comply with the Hague Convention still affords due process. *See, e.g., Burda Media, Inc.*, 417 F.3d at 302; *Koehler, supra,* 2004 WL 444101, at p.* 15; *Overseas Food Trading, Ltd. v. Agro Aceitunera S.A.*, No. 06-800, 2007 WL 77337 at * 3 (D.N.J. Jan. 8, 2007) (strict compliance with Hague Convention unnecessary where defendant received

actual notice and plaintiff made good faith effort to serve in accordance with Hague Convention).[8]

Moreover, where, as here, there is no dispute that the defendant actually received the pleadings, service is generally deemed proper under traditional notions of due process, even if governed by the Hague Convention. *See Burda Media, Inc., supra*; *In Re South African Apartheid Litigation*, 643 F. Supp.2d 423, 432 (S.D.N.Y. 2009); *Resource Trade Finance, Inc. v. PMI Alloys, LLC*, No. 99 civ 5156, 2002 WL 1836818, at p. *4 (S.D.N.Y. August 12, 2002); *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 397, 548 N.Y.S.2d 728, 732-33 (N.Y. App. Div., 2d Dept. 1989); *Greene v. Le Dorze*, No. CA 3-96-CV-590-R, 1998 WL 158632, at *4 (N.D.Tex. Mar.24, 1998) (failure to comply strictly with Hague Convention is *not* automatically fatal to effective service) (emphasis in original); *Fox v. Regie Nationale des Usines Renault*, 103 F.R.D. 453, 455 (W.D.Tenn.1984) (same); *Overseas Food Trading, Ltd., supra.*

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[8] As the circuit courts have noted, and the lower courts' decisions demonstrate, "whether a particular method of notice is reasonable depends on the particular [factual] circumstances." *Matter of Faden*, 96 F.3d 792, 796 (5th Cir. 1996) (quoting *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 484, 108 S.Ct. 1340, 1344 (1988). Those factual findings should not be disturbed on review unless they are "clearly erroneous." *See, e.g., Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527 (1986) (Facts necessary to proper determination of legal question should be reviewed by courts of appeals pursuant to "clearly erroneous" standard of review). Petitioner does not argue that the lower courts' factual findings were "clearly erroneous."

Applying these principles to the case at bar, it is clear that Petitioner has no legitimate challenge to the lower courts' factual finding that service complied with due process notwithstanding service of the writs in French. Petitioner does not claim that it did not know that a French Proceeding had been instituted against it. Petitioner does not claim that none of its employees speak French or that it could not have easily ascertained that the three French Writs were the lawsuits Galliano previously had threatened (in English). All the French Writs prominently contained the words "Galliano" and "Stallion", along with references to $187,500, the precise figure demanded in the English language letter of Galliano's attorneys.

The record also shows that on four separate occasions, a process server, one of whom was a uniformed United States Marshal, visited Petitioner's principal place of business and handed French legal papers – the French Writs and French Judgment – to three different employees of Petitioner, none of whom denies receiving them. Petitioner's principal also does not deny knowing that Galliano had commenced suit in France.

Ignoring these undisputed facts, Petitioner argues that it is necessarily a due process violation for an American entity to be served foreign legal documents written in the language of the contractually-agreed foreign court. No Court has ever adopted so expansive and radical a rule. To the contrary, courts have routinely upheld service of documents written in a language not understood by its recipients where the attendant circumstances trigger a "duty of further inquiry."

Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983) *cert den'd* 466 U.S. 929, 104 S.Ct. 1713 (1984) (service of notice from Department of Health and Human Services regarding plaintiff's eligibility for certain benefits does not violate due process where Spanish-speaking plaintiff does not speak English, the language in which the notices were served) (citing *Commonwealth v. Oliva*, 369 Mass. 62, 69, 337 N.E.2d 904, 909 (Mass. 1975) (service of documents constitutes "actual notice" even though Spanish speaking plaintiff did not understand English, the language in which documents were served, because service triggered a "duty of further inquiry" as to nature of documents served)); *Tahan v. Hodgson*, 662 F.2d 862, 865 (D.C. Cir. 1981) (recognizing judgment obtained in Israel even though defendant had been served in Israel in Hebrew, concluding that "[e]ven if the defendant were unable to read Hebrew, he should have surmised that the papers being served upon him were legal in nature, and that he could ignore them only at his peril.").

The lower courts said the same of Petitioner. Petitioner was engaged in an ongoing dispute with Galliano governed by a contract requiring resolution of the dispute in France. No reasonable construction of the largely undisputed facts supports an argument that Petitioner did not receive actual and timely notice of the filing of suit in France. Petitioner's efforts to distinguish this case from *Burda*, *supra*, the precedent relied upon by the Appellate Division, miss the mark. In *Burda*, the Second Circuit held that due process concerns were alleviated by "service of process by personal delivery through the French authorities." 417 F3d at 303. The Court in *Burda* was concerned with actual notice. *Id.* Petitioner still does not deny actual

notice of the commencement of suit in France, and both the Appellate Division and the New York State Court of Appeals found no reason to question Petitioner's actual notice. The Petition provides no cogent reason to overturn these unanimous rulings.

III. The United States Does Not Require Translation of Documents Served Under the Hague Convention

On its face, the Hague Convention never requires service of translated documents. The purpose of the Hague Convention is to facilitate service of process abroad by simplifying and expediting the procedures for such service, and to assure defendants of adequate notice that a foreign proceeding has commenced. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-703, 108 S. Ct. 2104, 2108-2110 (1988). In furtherance of this purpose, each signatory nation is required to designate a Central Authority to serve judicial documents requested by a signatory's courts. In the United States, the DOJ is the Central Authority, and it delegated process-serving responsibilities first to the United States Marshal's Service and subsequently to a private process serving firm.

Far from dictating the specific methods by which international service must be effected, Article 5 of the Hague Convention allows service in the following three ways:

> (a) by a method prescribed by its internal laws for the service of documents in domestic actions upon persons who are within its territory, or

> (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed,
>
> Subject to paragraph (b) of the first paragraph of this article, documents may always be served by delivery to an addressee who accepts it voluntarily (also known as "informal service" or "voluntary acceptance").

R. 175. *See* 20 U.S.T. 361 (1969).

Article 5 of the Hague Convention specifically addresses translation of documents only as follows:

> If the document is to be served *under the first paragraph above*, the Central Authority *may* require the document to be written in, or translated into, the official languages of the State addressed.

Id. (emphasis added).[9] The discretionary "may" in the translation provision of Article 5 does not require translation unless the Hague Convention signatory expressly requires it. *See, e.g., Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1389 (8th Cir. 1995); *Zelasko v. Comerio*, No. 08-366-MJR, 2008 WL 2755463 at p. * 2

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[9] The reference to the "first paragraph above" is to subparagraphs (a) and (b) of Article 5. The paragraph beneath those provisions is commonly referred to as the "second paragraph" of Article 5.

(S.D. Ill. July 14, 2008); *Vazquez*, 152 A.D.2d at 397, 548 N.Y.S.2d at 732-33.

A. Translation is Never Required Where Service is Made Through Article 5(2) of the Hague Convention

Translation of documents served under the second paragraph of Article 5 of the Hague Convention is never required. *See Vazquez, supra*, 152 A.D.2d at 397, 548 N.Y.S.2d at 732-33 ("[T]he convention provides no right to require translation of a document where service is made by the Central Authority by a particular method requested by the applicant pursuant to article 5(b). . . .") (internal quotations and citations omitted). Petitioner does not dispute this.

The second paragraph of Article 5 of the Hague Convention permits service upon an addressee who "voluntarily accepts" the papers as long as such method is compatible with the law of the State addressed. Here, service was indisputably requested pursuant to Article 5(2) and the courts below found that the facts established that Petitioner's receptionists voluntarily accepted service of the papers. *See* Decision of the Trial Court, Appendix C, at p. 19a; Appellate Division Decision, Appendix B, at p. 10a. This finding was in accord with well-settled New York statutory precedent. In fact, Petitioner adduced no evidence whatsoever that its employees refused to accept service. *See Greenfield v. Suzuki Motor Co., Ltd.*, 776 F. Supp. 698 (E.D.N.Y. 1991) where the Court found that, as here, "there was not any rejection of service by defendant to indicate that service was not voluntarily." *See also Arbitron, Inc. v. Marathon*

Media, LLC, No. 07 Civ.2099, 2008 WL 892366, at p. * 3 (S.D.N.Y. Apr. 1, 2008); *Eastman Kodak Co. v. Miller & Miller Consulting Actuaries, Inc.*, 195 A.D.2d 591, 592, 601 N.Y.S.2d 10 (N.Y. App. Div., 2d Dept. 1993); *Psathas v. Catskill Regional Off-Track Betting Corporation*, 173 A.D.2d 1070, 1071, 570 N.Y.S.2d 407, 408 (N.Y. App. Div., 3d Dept. 1991).

Petitioner asks this Court to determine that translation is required where documents are served under the first paragraph of Article 5(1). There is no need to reach this issue given the clear evidence that service was effectuated upon Petitioner through the second paragraph of Article 5 of the Hague Convention where, undisputedly, translation may never be required.[10]

B. The United States Does Not Require Translations of Pleadings Served Through Article 5(1) of the Hague Convention

The United States does not require translation even when service is made through Article 5(1) of the Hague Convention. Service, as described in the affidavits of the process servers, also satisfies the requirements of Article 5(1).

As above, Article 5(1) merely authorizes a treaty signatory to require translation. It contains no treaty obligation to translate. Where the Hague Convention

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[10] The claim that the French pleadings were "thrust" in the hands of its "support staff" is not supported in the Record, and is made for the first time in the Petition.

gives signatories the authority to opt out of a treaty obligation, or to impose a local requirement, these decisions will be evidenced in the signatory's official Declarations in the Record ("an Official Declaration") appended to the Hague Convention. *See, e.g.*, *Ackerman v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) (whether plaintiff violated F.R.C.P. 4 by effectuating service by mail was irrelevant since "the United States has made no declaration or limitation to its ratification of the Convention regarding Federal Rule 4"). Signatories wishing to make clear that they require translation of documents served under the first paragraph of Article 5 do so by publishing an Official Declaration, which becomes part of the treaty itself. Although the United States has issued Official Declarations to the Hague Convention on other topics, the treaty contains no Official Declaration by the United States requiring translation.[11]

Recognizing this, and the equal lack of a statute or DOJ regulation requiring translation, Petitioner seeks to cobble together a United States translation requirement from documents it claims to have obtained

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[11] Other signatories to the Hague Convention express their decision to require translated documents in this way. For example, Germany ("Formal service [Paragraph 1 of Article 5 of the Convention] shall be permissible only if the document to be served is written in, or translated into the German language") and Sweden ("By virtue of the third paragraph of Article 5 of the Convention, the Central Authority requires that any document to be served under the first paragraph of the same article must be written in or translated into Swedish.") have both issued Official Declarations making clear their translation requirements.

primarily through a FOIA request. Among these are (a) an unofficial response by a DOJ employee to a questionnaire from the Hague Convention treating a wide variety of issues (posted on a website of the Hague Convention), (b) two letters from a DOJ official to third parties, and (c) an unsigned "Circular Note" from Secretary of State Colin Powell's office to the "chiefs of the mission in the United States."

Merely examining these documents should be sufficient to demonstrate that none of them remotely have the force of law. Every court below has rejected Petitioner's attempt to impute to them any persuasive value at all. None purports to be an official act or pronouncement of the United States, let alone a rule, regulation or statute that would carry the weight of law. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1663 (2000) (opinion letters from agency officials do not amount to law or rule making). No foreign litigant, deciding how to seek service of a foreign court document on a United States party, would ever make a FOIA request to discern U.S. law on translation, and even if a litigant was to find Petitioner's FOIA documents, the litigant would not conclude that any of Petitioner's documents are authoritative. The litigant would look to the text of the Hague Convention itself and the Official Declarations of the United States, as its signatories intended, and would find no United States translation requirement.

The cases cited by Petitioner for the proposition that English translation is required under the Hague Convention all involve service of United States court papers in nations that have made a formal declaration

that translation is required. *See, e.g., Johnson v. Pfizer, Inc.*, No. 990118821, 2002 WL 1041984 at *1, 4 (Conn. Super. Ct. April 26, 2002) (service of English language papers in Sweden improper where Sweden's declaration on Hague Convention requires translation into Swedish); *Ward v. Ludwig*, 149 Ohio App. 3d 687, 778 N.E.2d 650 (Ohio App., 4th Dist. 2002) (service of English language papers in Germany improper where Germany's declaration on the Hague Convention requires translation into German); *Lasky v. Cont'l Prods. Corp.*, 97 F.R.D. 717 (E.D.Pa 1983) (service of English language papers in Germany improper where Germany's declaration on the Hague Convention requires translation into German). These cases are all wholly inapposite to the facts presented here.[12] Petitioner has not cited a single decision interpreting the Hague Convention or the United States Official Declarations thereto to require that service of foreign court documents in the United States, especially on a United States party who has contractually agreed to litigate abroad, must be accompanied by an English translation.

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[12] So too is Petitioner's claim, made for the first time in the Petition, that the doctrine of comity precludes recognition of the French Judgment because France requires translation. Frances translation requirement – expressed in an Official Declaration to the Hague Convention – is irrelevant to the question of what the United States requires.

CONCLUSION

Petitioner has not provided a single compelling reason for this Court to grant its Petition for a Writ of *Certiorari*. Accordingly, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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